UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

CASE NO. 20-CA-139745

Hobby Lobby Stores, Inc.,

Respondent,

and

The Committee to Preserve the Religious Right to Organize,

Charging Party.

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Dated: August 3, 2015

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I. INTRODUCTION

Respondent Hobby Lobby Stores, Inc. ("Hobby Lobby," the "Company," or "Respondent"), pursuant to Section 102.35 of the National Labor Relations Board's ("NLRB's" or "Board's") rules, and in accordance with the order[1] of Administrative Law Judge ("ALJ") Eleanor Laws, respectfully submits this brief on a joint stipulated record to the Administrative Law Judge.

II. STATEMENT OF THE CASE

The Charging Party filed the underlying unfair labor practice charge in this matter (the "Charge") on October 28, 2014, against Hobby Lobby. (Joint Exs. 2A & 2B.) The Charge alleges Respondent "has maintained policies in a Mutual Arbitration Agreement which violates [*sic*] the rights of employees to organize and to engage in other concerted activity for mutual aid or protection." (Joint Ex. 2A.) The Charge further alleges Respondent's policies interfere with an alleged "religious right to have a Union which is protected by the federal law including the National Labor Relations Act and the Religious Freedom Restoration Act." (Joint Ex. 2A.) The Charging Party claims this alleged interference constitutes an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act, as amended (the "Act"). (Joint Ex. 2A.)

On January 28, 2015, the Region issued a Complaint and Notice of Hearing (the "Complaint"). (Joint Exs. 2C & 2D.) Respondent filed its Answer and Affirmative Defenses to the Complaint on February 11, 2015. (Joint Ex. 2E.)

On April 9, 2015, the Region issued an Amended Complaint and Order Rescheduling Hearing (the "Amended Complaint"). (Joint Exs. 2F & 2G.) Respondent filed its Answer and Affirmative Defenses to the Amended Complaint on April 23, 2015. (Joint Ex. 2H.)

[1] "Order Granting General Counsel and Respondent's Joint Motion to Submit Stipulated Record to the Administrative Law Judge and Setting Briefing Schedule," dated June 29, 2015, and cited herein as "ALJO" followed by the appropriate page number(s).

On June 2, 2015, Respondent and Counsel for the General Counsel filed a Joint Motion to Submit Stipulated Record to the Administrative Law Judge. (ALJO, p. 1.) Thereafter, the Charging Party filed objections to the Proposed Stipulated Record, and the General Counsel and Respondent subsequently filed their respective reply briefs in response to the Charging Party's objections. (ALJO, p.1.) On June 29, 2015, the ALJ issued her order granting the General Counsel and Respondent's joint motion to submit a stipulated record to the Administrative Law Judge.

III. QUESTIONS INVOLVED

1. Whether the MAA and related policies maintained by Respondent, which require employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action violate Section 8(a)(1) of the National Labor Relations Act ("Act"). (Joint Ex. 1 (Stipulation of Issues Presented) at ¶ 1.)

2. Whether the MAA maintained by Respondent may reasonably be read to prohibit employees from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act. (Joint Ex. 1 at ¶ 2.)

3. Whether Respondent's enforcement of the MAA, through its motions to compel arbitration in *Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California; and *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California, is a violation of Section 8(a)(1) of the Act. (Joint Ex. 1 at ¶ 3.)

IV. STATEMENT OF FACTS

A. The Parties

Hobby Lobby is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. (Joint Ex. 2 (Stipulation of Facts) at ¶2(a).) It is a private, Oklahoma

corporation with offices, distribution centers, and approximately 659 stores located in all states but Alaska, Hawaii and Delaware. (Joint Ex. 2 at ¶2(a).) The Company operates several stores throughout the State of California, including one in Sacramento, California. (Joint Ex. 2 at ¶2(a).)

The Committee to Preserve the Religious Right to Organize filed the underlying unfair labor practice charge against Respondent in this matter. (Joint Ex. 2 at ¶1.)

B. Respondent's Employees

Respondent employs individuals in job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers; craft designers; graphic & web designers; production artists video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; packers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (Joint Ex. 2 at ¶4(a) & ¶4(b).)

C. Respondent's Mutual Arbitration Agreement

Among its policies and procedures Hobby Lobby has maintained a "Mutual Arbitration Agreement" applicable to applicants and employees (the "MAA"). (Joint Ex. 2 at ¶4(d) – ¶4(g); *see also* Joint Ex. 2I at pp. 5, 13, 53 & 55-56; Joint Ex. 2J at pp. 5, 13-14, 54 & 56-57; Joint Exs. 2K – 2X.) All of Hobby Lobby's employees are required to enter into the MAA as a condition of employment with Respondent. (Joint Ex. 2 at ¶4(e) & ¶4(i).)

The MAA that employees sign provides in pertinent part that the "Employee" and the "Company" agree to submit certain employment-related claims ("Disputes") to final and binding arbitration in lieu of filing a lawsuit in court. (Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.) By

entering into the MAA, the Employee and the Company specifically agree they "are giving up any right they might have at any point to sue each other." (Joint Ex. 2I at p. 56; Joint Ex. 2J at p. 57.)

The MAA provides the Employee and the Company will be the only parties to the arbitration of a Dispute under the MAA, "and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party." (Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.)

Notably, the MAA expressly affirms it does not comprise a waiver of the Employee's right to file claims with government agencies (such as the NLRB):

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.

(Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.)

The MAA that applicants for employment with Respondent must sign, contains provisions substantially similar to those described above, applicable to Hobby Lobby's employees. (Joint Ex. 2K; Jt. Ex. 2L.)

D. Federal Courts' repeated enforcement of the MAA

On December 3, 2013, Respondent filed a motion in the United States District Court for the Eastern District of California seeking to dismiss individual and representative wage-related claims filed against Hobby Lobby under California law by a former employee in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) ("*Ortiz*"). (Joint Ex. 2Y; Joint Ex. 2 at ¶5.) In the alternative, pursuant to the Federal Arbitration Act, Respondent moved to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Joint Ex. 2Y.)

On April 17, 2014, in *Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN (C.D. Cal.) ("*Fardig*"), Respondent filed a motion seeking to dismiss a putative class action lawsuit alleging wage and hour claims against Hobby Lobby under California law. (Joint Ex. 2Z; Joint Ex. 2 at ¶5.) In the alternative, pursuant to the Federal Arbitration Act, Respondent moved to compel individual arbitration under the MAAs that each of the named plaintiffs had signed when they began employment with Respondent. (Joint Ex. 2Z.)

On June 13, 2014, the U.S. District Court granted Respondent's motion to compel individual arbitration under the MAA. *See Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments the MAA was unenforceable under California law as allegedly unconscionable and unenforceable under the National Labor Relations Act ("NLRA") pursuant to the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I")*, enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) ("*D.R. Horton II*"). 2014 WL 2810025, at *3-*7. With respect to the NLRA argument, the *Fardig* court held:

> The Court concludes that following the NLRB's reasoning on this issue would conflict with the [Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*,] and the Supreme Court's decision in *Concepcion* strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions. Plaintiffs have cited no contrary authority, and the Court thus concludes that neither the NLRA nor the related Norris–LaGuardia Act renders the class waiver provision in the Agreement unenforceable.

Id. at *7 (internal citations omitted).

On October 1, 2014, another U.S. District Court in *Ortiz* granted Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. 2015). Like the *Fardig* court, the *Ortiz* court rejected the plaintiff's attempts to challenge the enforceability of the MAA on multiple grounds, including as allegedly

unconscionable under state law and as violating the NLRA. *Id.* at 1077-1083. With respect to the NLRA and the Board's decision in *D.R. Horton I*, the *Ortiz* court held:

> In *Horton I*, the NLRB held that an agreement compelling employees to waive their right to engage in concerted activity was an unfair labor practice, and concluded that the FAA did not preclude this rule because the rule is consistent with the FAA's savings clause. The Fifth Circuit Court reviewed and rejected the NLRB's decision in *Horton I*, finding that the NLRB's rule did not fall within the FAA's savings clause. The Court reasoned that the rule favored class proceedings over individual arbitration and therefore interfered with the objectives of the FAA. The *Fardig* Court similarly concluded that the NLRB's reasoning in *Horton I* conflicts with the FAA and the Supreme Court's decision in *Concepcion*, which strongly favors the enforcement of arbitration agreements and strongly disfavors striking class waiver provisions.
>
> Based on federal law, the Court finds that neither the NLGA nor the NLRA render the Arbitration Agreement substantively unconscionable.

Id. at 1082-83 (internal citations omitted).

V. ARGUMENT

A. The MAA does not violate Section 8(a)(1) of the NLRA.

Hobby Lobby's MAA is an ordinary individual employment arbitration agreement that Federal courts already have found to be enforceable under Federal and state law, including the NLRA. *See, e.g., Ortiz,* 52 F. Supp. 3d 1070; *Fardig,* 2014 WL 2810025. In particular, these federal courts have fully considered and expressly rejected any argument the FAA violates Section 8(a)(1) of the NLRA by mandating arbitration occur on an individual basis without providing procedures for class actions, collective actions, or joinder. *Id. Ortiz* and *Fardig*, like scores of Federal and state decisions before and since them,[2] demonstrate *D.R Horton I* was contrary to the law and should be disregarded and overturned.[3]

[2] *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, at 36 n.5 (2014) ("*Murphy Oil*") (Johnson, dissenting) (collecting citations to dozens of Federal and state courts rejecting *D.R. Horton I*).

[3] The GC likely will argue the ALJ is constrained to apply *D.R. Horton I* because it was not reversed by the Supreme Court. However, the Board failed to file a petition for a writ of certiorari to challenge the Fifth Circuit's rejection of *D.R Horton I.* Where the Board has elected to avoid Supreme Court review of

1. The FAA mandates enforcement of the MAA.

The FAA requires enforcement of the MAA according to its terms. The FAA provides such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

Under the FAA, parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties may "specify by contract the rules under which that arbitration will be conducted"); *Baravati v. Josephthal, Lyon & Ross, Inc*., 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Pursuant to Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds as exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Concepcion*, 131 S. Ct. at 1746. For instance, complaints about the "[m]ere inequality in bargaining power" between an employer and employee are insufficient to void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Similarly, the Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the

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Board precedent that federal and state courts almost universally reject and where that Board precedent involves primarily the Board's interpretation of statutes *other* than the NLRA and thus outside the Board's jurisdiction, ALJs should apply non-NLRA law as interpreted by federal courts.

federal statutes favoring this method of resolving disputes." *Id.* at 30. A party to an arbitration agreement "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 31 (citation omitted). Thus, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration ***cannot "go forward as a class action or class relief [cannot] be granted by the arbitrator."*** *Id.* at 31-33 (internal quotations and citation omitted) (emphasis added).

In short, state and federal courts "must enforce the [FAA] with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1202 (2012) (per curiam). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 669 (2012) (citation omitted).

Applying these principles, numerous courts have enforced mandatory employment arbitration agreements, like the MAA at issue here, containing class action waivers under the FAA. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also Vilches v. The Travelers Cos., Inc.*, 413 F. App'x 487, 494 & n.4 (3d Cir. 2011) (class action waiver was not unconscionable); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (same); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute.").

2. *D.R. Horton I* is contrary to the FAA.

Despite the extensive case law to the contrary, the Board in *D.R. Horton I* ruled that an employment arbitration agreement was unenforceable because it prohibited class procedures.

D.R. Horton I, *supra*, slip op. at 1. To reach that unprecedented result, *D.R. Horton I* reasoned employees' right to engage in protected concerted activity includes the "right" to bring a class or collective action. *Id.* at 2-4. *D.R. Horton I* was fundamentally flawed.[4]

a. *D.R. Horton I* conflicts with *Concepcion.*

D.R. Horton I wrongly concluded its ban on class action waivers is allowable because the ban is not limited to arbitration agreements. *Id.* at 9. The panel thus believed its rule did not treat arbitration agreements "less favorably than other private contracts" in violation of the FAA. *Id.*

In *Concepcion*, the Supreme Court expressly rejected the same attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. *Concepcion*, 131 S. Ct. at 1746-48. *Concepcion* recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *Id.* at 1747. For instance, a court might find unconscionable all agreements that fail to provide for "judicially monitored discovery." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* To avoid this result, the Supreme Court concluded the permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.* at 1748 (citation omitted).

[4] The Board adhered to *D.R. Horton I* in *Murphy Oil*. *See Murphy Oil*, slip op. at 5-18. *Murphy Oil*, which affirmed the Board's commitment to the reasoning and outcome of *D.R. Horton I*, is thus flawed for the same reasons, as are the Board's recent decisions applying *D.R Horton I* and *Murphy Oil*. *See Chesapeake Energy Corp. & Its Wholly Owned Subsidiary Chesapeake Operating, Inc. & Bruce Escovedo*, 362 NLRB No. 80 (Apr. 30, 2015); *Cellular Sales of Missouri, LLC & John Bauer*, 362 NLRB No. 27 (Mar. 16, 2015).

Therefore, a rule used to void an arbitration agreement is not saved under Section 2 of the FAA simply because it would apply to "any contract." The proper test is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.*

Applying this test, the *Concepcion* Court held a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* at 1750–52. Arbitration is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. *Id.* at 1751. Such informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *Id.* at 1751–52. The Court held:

> The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at 1748.

In *D.R. Horton I*, the Board attempted to distinguish *Concepcion* by reasoning its decision did not require class arbitration. *D.R. Horton I*, *supra*, slip op. at 12. Rather, the panel claimed it required only the availability of class procedures in some forum, thus forcing employers to ***either*** (i) permit class arbitration, ***or*** (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But that was a distinction without a difference. Like the California law, the *D.R. Horton I* decision "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion*, 131 S. Ct. at 1744. The addition in *D.R. Horton I* of the option of avoiding class arbitration only by agreeing ***to forgo arbitration*** does not reduce the degree to which its ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748. To the contrary, requiring a party to abandon the

arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration alone. Obviously, the Supreme Court's ruling interpreting the FAA is binding on lower courts, the Board, and ALJs. *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1048 (N.D. Cal. 2012) (concluding court was bound by *Concepcion*'s "statement of the meaning and purposes of the FAA" in determining whether FAA or NLRA controlled enforceability of arbitration agreement).[5]

b. *D.R. Horton I* misapplied *Gilmer.*

The Board in *D.R. Horton I* also concluded an employment arbitration agreement is not enforceable because it would require employees to forgo a substantive statutory right in violation of *Gilmer*. *D.R. Horton I, supra*, slip op. at 9-11. However, the analysis in *D.R. Horton I* was fundamentally inconsistent with *Gilmer*. In considering whether mandatory arbitration violates an employee's substantive statutory rights, the Board in *D.R. Horton I* looked to the wrong statute (the NLRA rather than the FLSA), failed to ask the right question (whether the employee could vindicate his FLSA rights effectively in arbitration), and came to the wrong answer (the arbitration agreement was unenforceable ***even if*** the employee could vindicate his FLSA rights effectively in arbitration).

The issue in *Gilmer* was whether a claim under the Age Discrimination in Employment Act ("ADEA") was subject to compulsory arbitration. *Gilmer*, 500 U.S. at 23. The Court observed, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a

[5] *Murphy Oil* did not defend *D.R. Horton I*'s effort to distinguish *Concepcion* on these grounds but instead dismissed the case as merely dealing with federal preemption of state law. *Murphy Oil*, *supra*, slip op. at 9. *Murphy Oil*'s narrow view of *Concepcion* as limited to preempting state statutes in conflict with the FAA was rejected by the Supreme Court in *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, 133 S. Ct. 2304 (2013) (applying *Concepcion* to federal antitrust statutes) and *CompuCredit*, 132 S. Ct. 665 (applying *Concepcion* to federal CROA).

judicial, forum.'" *Id.* at 26 (citation omitted). The Court also confirmed that claims under statutes like the ADEA advancing important public policies may be arbitrated. "[S]o long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (citation omitted).

The *Gilmer* Court also explained the burden is on the party opposing enforcement of an arbitration agreement to "show that Congress intended to preclude a waiver of a judicial forum" for the claim at issue. *Id.* at 26. The Court instructed that "[i]f such an intention exists, it will be discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (citation omitted).

Like *Gilmer*, other Supreme Court cases deciding whether arbitration violates a statutory right also considered whether a party could enforce a particular statutory claim effectively in arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985). Contrary to *Gilmer* and every Supreme Court case on point, the *D.R. Horton I* decision failed to treat as dispositive the question whether an employee could vindicate his statutory rights under the FLSA effectively pursuant to the arbitration agreement's procedures. *D.R. Horton I, supra*, slip. op. at 10 & n.23. Instead, *D.R. Horton I* reasoned "the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." (*Id.* at 10.)[6]

[6] *Murphy Oil* stood by *D.R. Horton I*'s characterization of the substantive federal right allegedly at issue. *Murphy Oil, supra,* slip op. at 6 n.32.

D.R. Horton I thus turned *Gilmer* on its head. In that case and others, the Supreme Court rejected a variety of challenges to arbitration procedures based on their differences from judicial procedures. Those cases concluded such differences did not *per se* render arbitration unsuitable for adjudicating statutory claims. Rather, statutory claims may be arbitrated, even though the arbitral procedures are different from judicial procedures, because those differences do not prevent a party from enforcing and obtaining relief on statutory claims.

In *D.R. Horton I*, the Board ignored this fundamental teaching. Instead, the Board held an arbitration agreement, to be enforceable under the FAA and the Act, ***must*** allow an employee to invoke certain procedures in the course of obtaining an adjudication of his or her statutory claims. This was directly contrary to *Gilmer* and related decisions, which held parties generally do ***not*** have a non-waivable right to obtain an adjudication of their federal statutory claims ***by a particular means***. *Gilmer*, 500 U.S. at 30-32; *see also Am. Express*, 133 S. Ct. at 2311 ("The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938 . . . ."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.").

Strikingly, in *D.R. Horton I*, the Board held an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. *D.R. Horton I*, *supra*, slip op. at 9-10 & n.23. The Board deemed the arbitration agreement void solely due to the ***means*** it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication. That is the very opposite of *Gilmer*'s rationale.

Additionally, the Board in *D.R. Horton I* failed to apply *Gilmer*'s test for determining whether Congress intended to preclude the waiver of a judicial forum and its procedures for a

statutory claim. A court must answer this question based on the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer,* 500 U.S. at 26; *see also McMahon*, 482 U. S. at 227; *Mitsubishi Motors*, 473 U. S. at 628. The Court reaffirmed its commitment to this inquiry in *CompuCredit Corp.*, where it analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA to preclude arbitration of CROA claims. *CompuCredit Corp.,* 132 S. Ct. at 669. The *CompuCredit* Court also reiterated that ***if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms."*** *Id.* at 673 (emphasis added).

D.R. Horton I never explored Congress' intention regarding the preclusion of arbitration for FLSA claims. If it had done so, it would have found Congress was silent on the subject and thus FLSA claims are subject to arbitration, as courts repeatedly have found. *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" and "nothing that would even implicitly" suggest Congress intended to preclude arbitration of FLSA claims).

In *D.R. Horton I*, the Board also did not look for any indication in the NLRA's text or history of a congressional intent to override the FAA and require that employees have access to class procedures. Indeed, to the extent *D.R. Horton I* considered the issue, it got the inquiry backwards, concluding "nothing in the text ***of the FAA*** suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *D.R. Horton I, supra,* slip op. at 11 (emphasis added). If the *D.R. Horton I* panel had asked the right question, it would have found "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso*, 2012 WL 1309171, at *8; *see also D.R. Horton II*, 737 F.3d at 360. Indeed, the simple fact that modern class procedures did not exist until decades after the NLRA was enacted

makes it obvious Congress had no intention of the NLRA affecting employees' access to those procedures. *See, e.g., Am. Express*, 133 S. Ct. at 2310 (noting federal antitrust statutes "do not 'evinc[e] an intention to preclude a waiver' of class-action procedure" where those statutes "make no mention of class actions" and "were enacted decades before the advent of Federal Rule of Civil Procedure 23"); *CompuCredit Corp.*, 132 S. Ct. at 673.[7]

In the end, *D.R. Horton I* simply declared there was "an inherent conflict" between the NLRA and the arbitration agreement's waiver of class procedures. *D.R. Horton I, supra*, slip op. at 11. The panel cited no authority for this finding. Indeed, the Supreme Court has never voided an arbitration agreement on "inherent conflict" grounds. To the contrary, courts have repeatedly found no "inherent conflict" between arbitration and other statutes. *E.g.*, *Gilmer*, 500 U.S. at 27-29 (no inherent conflict between arbitration and the ADEA); *Rodriguez*, 490 U.S. at 485-86 ("resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act"); *McMahon*, 482 U.S. at 242 (no inherent conflict between arbitration and RICO's private treble damages provision); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006) (no inherent conflict between arbitration and USERRA); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 477-78 (5th Cir. 2002) (no inherent conflict between arbitration and the Magnuson–Moss Warranty Act). The unreasoned declaration to the contrary in *D.R. Horton I* was an empty reference to *Gilmer* without analyzing

[7] The *Murphy Oil* panel concedes "the NLRA does not explicitly override the FAA." *Murphy Oil, supra*, slip op. at 10. It argues there was an "obvious reason" for this silence: when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not yet been applied to employment arbitration agreements, which only occurred much later in 2001. *Id.* Notably, *Murphy Oil*'s reasoning in this regard undercuts *D.R. Horton I*'s suggestion the 1932 NLGA directly repealed, and the 1935 NLRA impliedly repealed, the 1925 FAA with respect to individual employment arbitration agreements decades *before* the FAA was recognized as applying to employment arbitration agreements. *D.R. Horton I, supra*, slip op. at 12 & n.26. This chronology of implied repeals makes no sense.

its substance. *Murphy Oil* did not add anything to support *D.R. Horton I*'s suspect "inherent conflict" finding. *Murphy Oil, supra,* slip op. at 10.

c. *D.R. Horton I* erred in ruling an arbitration agreement waiving class procedures unenforceable on public policy grounds.

The Board in *D.R. Horton I* reasoned the FAA's savings clause permitted it to declare an arbitration agreement waiving class procedures unenforceable as contrary to public policy. The panel's analysis, however, is faulty for multiple reasons.

i. *D.R. Horton I* improperly applied a common-law balancing test to determine whether another federal statute manifests a public policy sufficient to avoid the FAA.

In *D.R. Horton I,* the Board considered whether another federal statute might manifest a public policy that would void an arbitration agreement irrespective of the FAA. *D.R. Horton I, supra,* slip op. at 11-12. The panel treated the common law's "public policy" balancing test as giving it broad discretion to determine for itself whether the policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA's mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. *Id.*

No precedent exists for applying this balancing test to the FAA. Indeed, "[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on 'public policy' grounds an agreement that did not violate, or provide for the violation of, some positive law." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress

restricts the use of arbitration, it does so clearly). In *D.R. Horton I*, the panel improperly relied on its own determination of "public interests" rather than deferring to congressional purpose. *D.R. Horton I, supra*, slip op. at 11-12. *Murphy Oil* did not even attempt to defend this aspect of *D.R. Horton I.*

ii. No precedent exists for the *D.R. Horton I* holding that arbitration agreements waiving class procedures conflict with the Act.

The *D.R. Horton I* decision did not cite any decision during the NLRA's nearly 80-year history holding a contract unenforceable because it interfered with employees' general "right to engage in protected concerted action." The panel cited only a number of decisions pre-dating the Supreme Court's decision in *J.I. Case* in which various individual employment agreements were held unlawful under the NLRA because employers used them to violate certain specific, well-defined rights granted employees in Section 7, not the general "right to engage in protected concerted action."

Indeed, *D.R. Horton I* failed to acknowledge Section 7's rights run from the well-defined and specific – rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing" – to the very general – the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157. In every decision cited in *D.R. Horton I,* a court held unlawful an individual agreement that attempted to restrict one of the specific, well-defined rights protected in Section 7; ***none*** held an agreement void because it allegedly violated an employee's far more amorphous Section 7 right to engage in concerted activities for mutual aid or protection. *D.R. Horton I, supra,* slip op. at 4-5 & n.7.[8]

[8] *See, e.g., Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served "to forestall union activity" and "create a permanent barrier to union organization"); *NLRB v. Adel*

For example, in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), an employer refused to recognize a union and established a committee to negotiate individual employment contracts in lieu of collective bargaining. The Supreme Court found the individual contracts "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act." *Nat'l Licorice Co.*, 309 U.S. at 361.

Four years later, in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), an employer claimed it need not bargain collectively because it already had entered individual employment agreements with employees prior to a union being certified as their exclusive bargaining representative. The Supreme Court did *not void the individual agreements* but held their existence did not excuse the employer from bargaining collectively because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *J.I. Case Co.*, 321 U.S. at 336-38. The other decisions cited in *D.R. Horton I* all involved employers' use of individual employment agreements prior to *J.I. Case* to attempt to avoid employees' specific Section 7 rights to form or join labor organizations and engage in collective bargaining. *D.R. Horton I, supra*, slip op. at 4-5 & n.7.

Clay Prods. Co., 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served "as a means of defeating unionization and discouraging collective bargaining"); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, "the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees' right to bargain collectively for a period of two years and were "adopted to eliminate the Union as the collective bargaining agency" of employees); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer's plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which "deprive[d] the employee of the right to designate an agent to bargain with reference thereto").

The *D.R. Horton I* panel claimed these decisions held individual agreements are unlawful merely because they "purport to restrict Section 7 rights." (*Id.* at 4.) Such an extrapolation is without basis. *Cf., Webster v. Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (rejecting characterization of *National Licorice* as barring "individual contracts which purport to waive rights protected by Section 7" as too broad). *D.R. Horton I*'s citations showed only that there was a brief period, before the Supreme Court's landmark decision in *J.I. Case* during which courts invalidated individual agreements used by employers to willfully avoid collective bargaining and interfere with well-defined and specific rights granted in Section 7. The employers in those cases acted with anti-union animus and required individual agreements for the very purpose of interfering with those rights. The individual agreements served no legitimate purpose.

The decisions relied upon in *D.R. Horton I* were thus irrelevant to the validity of an ordinary arbitration agreement containing a class waiver. The difference between those old cases and an employer's routine use of an arbitration agreement with a class waiver are stark:

- Such an employer is obviously not attempting to use the arbitration agreement as a basis to avoid collective bargaining with a union, and often there is no union at issue at all.
- The only Section 7 right identified in *D.R. Horton I* was the very general right "to engage in . . . concerted activities for the purpose of . . . other mutual aid or protection." *D.R. Horton I, supra*, slip op. at 2. However, no decision cited by *D.R. Horton I* relied on this highly generalized, catch-all provision of Section 7.
- There was no allegation or evidence in the ordinary case (such as this one) that the employer created its arbitration agreement for an improper purpose under the law, unlike the employers in the early 20th century cases cited by the *D.R. Horton I* panel. To the contrary, current federal law recognizes the value and legitimacy

of arbitration agreements and ***encourages*** them. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) ("there are real benefits to the enforcement of arbitration provisions"). The Supreme Court has recognized that class-arbitration waivers, in particular, are legitimate and reasonable. *See Concepcion*, 131 S. Ct. at 1748.

D.R. Horton I's reliance on such dissimilar and irrelevant cases involving fundamentally different contexts merely demonstrated there was no basis in the eight decades of jurisprudence under the Act for voiding routine individual employment arbitration agreements.

iii. An arbitration agreement waiving class procedures is not the equivalent of retaliating against employees for concertedly asserting their legal rights.

Even if it had been appropriate to weigh the public policies underlying the FAA and Act, the *D.R. Horton I* panel did so in a profoundly unreasonable way. The panel equated requiring the waiver of class procedures as a condition of employment with retaliating against employees for exercising NLRA rights, and it relied on decisions in which employers terminated employees for filing lawsuits. *D.R. Horton I, supra,* slip op. at 2-3 & n.3.

No reasonable justification exists for treating a voluntary arbitration agreement containing a class-action waiver, required as a condition of employment, as equivalent to firing an employee because he concertedly sued his employer. The former involves action recognized by the law as legitimate. Again, federal law acknowledges individual employment arbitration yields benefits to the parties and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. When an employer declines to employ individuals who refuse to agree to individualized arbitration, the employer's actions further the ends Congress and the courts deem legitimate and beneficial. Moreover, the employer's actions

do not adversely affect employees' substantive claims against the employer; employees may vindicate such claims effectively through arbitration.

d. *D.R. Horton I* erred in finding the Norris-LaGuardia Act trumps the FAA.

In *D.R. Horton I*, the Board also concluded the NLGA voided employment arbitration agreements with class action waivers and partially repealed the FAA so that it does not apply to employment arbitration agreements containing class action waivers. *D.R. Horton I, supra*, slip op. at 5-6, 12. However, the NLGA is "outside the Board's interpretive ambit," 737 F.3d at 362 n.10, and as the *Murphy Oil* panel conceded, the Board is not entitled to deference in interpreting the NLGA, *Murphy Oil, supra*, slip op. at 10. Moreover, the *D.R. Horton I* decision failed to cite any court decision treating the NLGA as repealing the FAA.

The reliance in *D.R. Horton I*'s on a novel interpretation of the NLGA is unfounded. Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides that "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his employment would terminate if he did – are unenforceable in federal courts. *Id.* § 103.

D.R. Horton I concluded the NLGA "prohibit[s] the enforcement of . . . agreements comparable to" an individual employment arbitration agreement, but that conclusion distorted history and the statute. *D.R. Horton I, supra,* slip op. at 5. When Congress adopted the NLGA in 1932, the Federal Rules, the FLSA, and the modern class action device did not yet exist. To suggest the NLGA's public policy manifests any intention that employees have a substantive, non-waivable right to invoke class procedures is nonsensical.

The analogy in *D.R. Horton I* of arbitration agreements to "yellow-dog" contracts also fails. If an employee promises to arbitrate individually and is hired, but then files a class action lawsuit in breach of the promise, an arbitration agreement does not provide the employee's employment will terminate for having done so, as would occur under a "yellow-dog" contract. Rather, an employer will simply move to compel individualized arbitration under the FAA, without any effect on employment status whatsoever.

In any event, even assuming some conflict did exist between the NLGA and the FAA, it would be up to courts, not the Board, to resolve that conflict, which is outside the Board's jurisdiction. *See, e.g.*, *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013) (on employer's motion to compel arbitration under the FAA, addressing employee's challenge to enforceability of individual arbitration agreement based in part on NLGA).[9]

Finally, the *D.R. Horton I* panel got its chronology wrong in evaluating whether the NLGA and/or the Act should be viewed as partially impliedly repealing the FAA. The panel assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton I, supra*, slip op. at 8. Therefore, if the FAA conflicted with either of those statutes, *D.R. Horton I* reasoned the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.* at 12 & n.26.

However, *D.R. Horton I* failed to account for the dates when the NLRA and FAA were ***re-enacted.*** Those are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway

[9] Again, assuming for the sake of argument there existed a conflict between the NLGA and the FAA, federal courts are tasked with "reconciling" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *Cf. Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970) (explaining it became the task of the courts to accommodate the NLGA, which was responsive to very different conditions at the beginning of the last century, to subsequent shifts in labor law).

Labor Act to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail).

The NLGA was enacted in 1932 and never re-enacted; the NLRA was re-enacted June 23, 1947; and the FAA was re-enacted July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Accordingly, the FAA is the most recently reenacted. If a "irreconcilable conflict" existed among them, the FAA would thus prevail.[10]

For all of these reasons, the *D.R. Horton I* decision must be disregarded because it is contrary to the FAA.

3. The NLRA does not grant employees a right to access class procedures created by other laws.

Irrespective of the FAA's requirements, *D.R. Horton I* decision was also wrong for another and even more basic reason: the NLRA does not provide a non-waivable right to invoke class procedures.

a. The decisions cited by *D.R. Horton I* do not suggest Section 7 grants employees a right to seek to have their claims adjudicated collectively.

D.R. Horton I did not find the NLRA expressly addresses the procedures by which employees may seek to have their employment-related claims adjudicated. Rather, *D.R. Horton I* reasoned "the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." *D.R. Horton I, supra*, slip op. at 2. However, *D.R. Horton I* fundamentally erred by failing to distinguish between employees' (i) collectively

[10] *Murphy Oil* states the FAA's reenactment in 1947 should not be viewed as altering the scope of the NLGA or NLRA. *Murphy Oil* reasons "[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice." *Murphy Oil*, *supra*, slip op. at 11. However, *D.R. Horton I* and *Murphy Oil* assume the NLGA's enactment in 1932 and the NLRA's in 1935 restricted the scope of the 1925-enacted FAA with respect to the enforceability of individual employment arbitration agreements "without debate or even notice." Rather than engaging in further speculation concerning which statute impliedly repealed the other, it is more plausible to read the NLGA and NLRA as not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

asserting they have certain legal rights in an attempt to obtain concessions concerning the terms and conditions of their employment and (ii) seeking and obtaining a collective ***adjudication*** of their employment-related legal claims. While the NLRA may protect the former, it says nothing about the latter. The cases cited by *D.R. Horton I* show only that Section 7 protects employees from retaliation for concertedly asserting they have certain legal rights against their common employer with respect to the terms and conditions of their employment, not that employees have a right under the NLRA to seek a collective adjudication of their legal claims.

For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court noted some lower courts had applied the "mutual aid or protection" clause to protect employees from retaliation for "resort[ing] to administrative and judicial forums" in seeking to improve their working conditions. However, the Supreme Court *expressly reserved* the question of "what may constitute 'concerted' activities in this context." *Id.* at 566 n.15.

In addition, *Salt River Valley* makes clear that employees' Section 7 right to "resort to judicial forums" is correctly understood as a right to assert legal rights collectively, which is not the same thing as a right to invoke judicial or arbitral procedures for a collective adjudication of claims. In that case, a number of employees believed they were due back pay under the FLSA and grew dissatisfied when their union did not appear to be pursuing the issue. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). The employees enlisted "the support of others in a movement to recover back pay and overtime wages." *Id.* at 863. To this end, Leo Sturdivant, one of the complaining employees, circulated a petition among his co-workers through which they designated him their agent "to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise" and authorized him to employ an attorney to represent them. *Id.* at 864. Both the union and the employer learned of the petition, both opposed it, and Sturdivant's employment was soon terminated.

Significantly, the employees' protected concerted activities in *Salt River Valley* in asserting their legal rights all occurred ***outside*** of any adjudicatory proceeding. That protected conduct involved employees attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or, if necessary, pool their resources to finance litigation. ***The employees' protected concerted activities did not utilize or depend on any class procedures.*** The employees collectively demanded their employer comply with the FLSA, which they believed granted them certain legal rights, regardless of whether any claims actually filed would be adjudicated collectively or individually.

The other decisions cited in *D.R. Horton I* similarly lack any hint that employees have a Section 7 right to seek a collective adjudication of their claims. Rather, those cases, like *Salt River Valley*, demonstrate the far more general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of their employment. *D.R. Horton I*, *supra*, slip op. at 2-3 & n.3.[11]

[11] *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union's filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union's pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee's arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

b. A "right" to class action procedures is illogical because the NLRA cannot mandate certification of a class action.

D.R. Horton I recognized that under the Federal Rules, a court may deny an employee's motion for class certification. *D.R. Horton I* thus conceded Section 7 cannot grant employees a "right to class certification." (*Id.* at 10.) Consequently, *D.R. Horton I* reasoned that Section 7 can guarantee employees a purported right only "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." *Id.* (emphasis added). *D.R. Horton I* even acknowledged an employer may oppose employees' motion for class certification without violating Section 7. *Id.* at 10 n.24. The premise in *D.R. Horton I* was apparently that, even if employees are unsuccessful in obtaining class certification, they were at least able to exercise their Section 7 rights by collectively "seeking" class certification and "invoking" Rule 23 or similar procedures.

Assuming the "right" identified by *D.R. Horton I* existed,[12] a class action waiver does not abridge that purported right any more than an employer's filing an opposition to an employee's motion for class certification. An arbitration agreement waiving class procedures does not, and cannot, prevent employees from joining together to file a class action lawsuit or concertedly demanding class arbitration. An employer may respond to such a purported class or collective action lawsuit by moving to stay the action and compel individualized arbitration. But, there is no rational difference for Section 7 purposes between an employer responding to a class action lawsuit with a successful motion to compel individualized arbitration and responding with a successful opposition to class certification. In ***each*** instance, by the time the employer files its

[12] In fact, the Supreme Court has already made clear there is no such right. *Am. Express*, 133 S. Ct. at 2310 (rejecting argument that "federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration").

court document, the employee(s) ***already will have taken*** "the collective action inherent in seeking class certification" and ***already acted*** concertedly by "invoking" class certification procedures. In short, the analysis in *D.R. Horton I* is illogical.

4. The holding in *D.R. Horton I* that employees have a right to class procedures was not a permissible interpretation of Section 7.

Because the Board's authority under the NLRA is limited, the Board's constructions of the Act must be rational and consistent with it. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994) (Board's interpretation was irrational and inconsistent with the NLRA); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (rejecting Board's interpretation of the NLRA); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202-04 (1986) (same); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317-318 (1965) (same). In *D.R. Horton I*, the panel exceeded its authority by purporting to grant employees non-waivable substantive rights to procedures that are not created by the NLRA but rather by other authorities for other purposes.

a. *D.R. Horton I* conflicts with the Rules Enabling Act.

In the Rules Enabling Act ("REA"), Congress delegated authority to the Supreme Court to promulgate the Federal Rules. 28 U.S.C. § 2072(b). The REA expressly provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). Rule 20 (permissive joinder) and Rule 23 (class actions) are permissible under the REA because they regulate only procedures and do not impact substantive rights. *See, e.g., Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins., Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (Federal Rule 23 is valid under the REA because "[a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits" and "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

Because the NLRA does not create class procedures, employees would not have any purported right to bring a class action in Federal court but for Rule 23 of the Federal Rules. *D.R. Horton I* thus treats Rule 23 as expanding employees' right under Section 7 to engage in protected concerted activity. Consequently, *D.R. Horton I* conflicts with the REA to the extent it construes the Federal Rules as enlarging employees' substantive rights. *Cf. Am. Express*, 133 S. Ct. at 2310-11 (treating Rule 23 as "establish[ing] an entitlement to class proceedings for the vindication of statutory rights" and "invalidating private arbitration agreements denying class adjudication" would likely "be an "abridg[ment]" or "modif[ication]" of a "substantive right" forbidden to the Rules under the REA).

b. *D.R. Horton I* conflicts with the Federal Rules and other procedures.

D.R. Horton I also is at odds with courts' interpretation of Rule 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have held repeatedly and expressly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class action is merely a procedural device; it does not create new substantive rights."), *rev'd on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). State class action procedures are treated similarly. *See, e.g.*, *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (holding there is no "substantive right to pursue a class action, in either Texas state or federal court"). *D.R. Horton I* disregarded this substantial body of precedent interpreting rules and statutes outside the Board's jurisdiction and expertise.

Treating procedures as non-negotiable, as the panel did in *D.R. Horton I,* was inconsistent with the practice of courts and litigants under the Federal Rules. Those rules (and their state counterparts) generally permit, and sometimes mandate, that litigants negotiate regarding the procedures governing the adjudication of their disputes. *E.g*., Fed. R. Civ. P. Rules 16(b) & (c) and 26(f) (allowing parties to agree on procedures governing case); 29 (allowing parties to stipulate to changes in discovery procedures); 37(a)(1) (requiring parties to attempt to agree on resolution to discovery disputes before seeking court action).

Parties in litigation frequently negotiate, and courts routinely enforce, agreements regarding class procedures, including agreed scheduling orders setting deadlines for motions for certification or permissive joinder; agreements extending the time in which employees may move for certification; stipulations as to the scope of any certified class; agreements by the parties as to the time period during which opt-ins in FLSA collective actions may file their consents to join a case or during which putative members of Rule 23 classes may file their notices to opt out; and stipulations and settlement agreements dismissing class allegations on agreed terms. Under *D.R. Horton I*'s novel rule granting employees substantive, non-waivable rights to class procedures, such routine agreements would be invalid because they narrow or waive employees' purported non-negotiable NLRA rights.

Indeed, the Board in *D.R. Horton I* held employees have not only a substantive right under the NLRA to invoke class action procedures ***but also suggested employees are entitled to have their motions for certification decided on their merits according to Rule 23's requirements.*** *D.R. Horton I, supra,* slip op. at 10 & n.24; *see also Murphy Oil, supra*, slip op. at 5 n.30. Any such right would seemingly prohibit employers from opposing an individual employee's class action complaint with a Rule 12(b) motion or a wide variety of procedural and substantive defenses unrelated to the requirements of Rule 23 and limit courts' ability to rule on

such issues. For instance, some local rules require parties to file motions for class certification within 90 days of filing a class action complaint. *E.g.*, N.D. Ohio L.R. 23.1(c); C.D. Cal. L.R. 23-3; S.D. Ga. L.R. 23.2. Courts may deny certification motions for failing to comply with such rules. *E.g.*, *Walton v. Eaton Corp.*, 563 F.2d 66, 75 n.11 (3d Cir. 1977) (district court did not abuse discretion in denying motion for certification as untimely); *Batson v. Powell*, 912 F. Supp. 565, 570-71 (D. Del. 1996) (denying motion for certification as untimely). However, if employees have a substantive right to have certification motions decided on their merits, these local rules would be invalid.[13]

Finally, the *D.R. Horton I* decision is contrary to Supreme Court and other case law holding parties are generally free, as a matter of contract, to agree to the procedures that will govern their arbitrations. *E.g.*, *Volt Info. Sciences, Inc.*, 489 U.S. at 479; *Baravati*, 28 F.3d at 709.

c. *D.R. Horton I* conflicts with the FLSA.

D.R. Horton I also conflicts with the FLSA's collective action procedures. Courts regularly hold those procedures, like Rule 23's class action procedures, do not provide substantive rights and are waivable. *E.g.*, *Carter*, 362 F.3d at 298.

In concluding employers and employees are not permitted to agree to arbitrate FLSA claims individually, the Board in *D.R. Horton I* failed to consider that individual arbitration is fully consistent with the purposes underlying § 216(b)'s current structure. 29 U.S.C. § 216(b). Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to limit the number of

[13] In *Murphy Oil*, the Board stated its concern is "with employer-imposed restraints that would preclude employees from seeking to use [group litigation] mechanisms." *Murphy Oil*, *supra*, slip op. at 17. Under the logic of *D.R. Horton I* and *Murphy Oil*, an employer that makes an offer of judgment for the purpose of mooting the claims of a putative class or collective action plaintiff before he or she moves for class/collective action certification would be engaging in an unfair labor practice under the Act. That cannot be, and is not, the law. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ___, 133 S. Ct. 1523 (2013).

collective actions filed and require every employee who participates in such actions to give his or her consent to be a party-plaintiff. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). There is no rational basis for finding an arbitration agreement waiving class procedures interferes with employees' purported right to engage in concerted activity any more than does the FLSA's own individual opt-in requirement. *D.R. Horton I*, *supra*, slip op. at 3 & n.5.

Furthermore, the *D.R. Horton I* decision apparently presumes employees have a substantive right under the NLRA to invoke procedures for notifying putative collective action members under § 216(b). However, the FLSA does not establish ***any*** procedures for identifying and notifying putative collective action members of their opportunity to opt in to a lawsuit. Rather, any such communications are based on courts' inherent authority and discretion to manage their cases. *See Hoffmann-La Roche*, 493 U.S. at 174. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in the exercise of judicial discretion.

5. *D.R. Horton I*'s construction of Section 7 was unreasonable.

Even if the Board had any authority under the NLRA to define Section 7 rights as guaranteeing employees' access to adjudicatory procedures, *D.R. Horton I*'s holding that employees have a right to invoke class procedures was unreasonable. "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). In *D.R. Horton I*, the Board completely failed to consider the purposes and functions of class procedures generally, the means available to employees to pursue their claims effectively on an individual basis, and employers and employees' legitimate interests in agreeing to individualized arbitration.

a. *D.R. Horton I* ignored the intended purposes of class procedures.

Class procedures serve to allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants. 1 MCLAUGHLIN ON CLASS ACTIONS §1:1 (8th ed.). There is no basis in the NLRA, the Federal Rules, or case law for *D.R. Horton I*'s novel presumption that class procedures were created to serve any concerns or purposes under the NLRA. *See Amchem Prods.*, 521 U.S. at 613-15 (current class action procedures originated only in 1966).

b. *D.R. Horton I* ignored the negligible role class procedures play under the NLRA.

Contrary to speculation in *D.R. Horton I*, employees need not, and regularly do not, rely on class procedures to vindicate their rights. In practice, employees pursue statutory employment claims on an individual basis with great frequency. For example, in 2011, there were 6,180 private FLSA lawsuits filed in federal court, a large percentage of which were individual suits, and 99,947 charge filings with the EEOC. *See* Judicial Bus. Of the U.S. Courts 2011, Table C-2 at 127.[14] Moreover, the EEOC, the DOL, and other federal and state agencies remain empowered to pursue class or collective actions on behalf of employees in appropriate cases, irrespective of employees' arbitration agreements waiving such procedures. *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (noting "a promising alternative to class action treatment" is "to complain to the Department of Labor, which . . . can obtain in a suit under the [FLSA] the same monetary relief for the class members that they could obtain in a class action suit were one feasible").

In *D.R. Horton I*, the Board also failed to acknowledge most employment claims amenable to class treatment involve fixed, ***statutory*** rights, not obligations dependent on

[14] Available at: http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

employees' individual or collective bargaining power. Such statutes mandate certain terms and conditions of employment as a matter of law. The same employment statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis. Such anti-retaliation and fee-shifting provisions adequately protect employees and give sufficient incentive to employees (and their counsel) to pursue their claims individually. *Compare D.R. Horton I, supra,* slip op. at 3 & n.5 *with Holling Press, Inc.*, 343 NLRB 301, 303 n.15 (2004) (employee allegedly terminated for pursuing a sexual harassment claim could seek protection under the anti-retaliation provisions of anti-discrimination statute even though her conduct was not protected under the NLRA).

D.R. Horton I also wrongly equated employees' engaging in concerted legal activity with their invoking class action, collective action, and joinder procedures. *D.R. Horton I, supra*, slip op. at 10. However, when asserting legal claims, employees may act concertedly in many ways that do not depend on, and have nothing to do with, adjudicatory procedures.

For example, irrespective of individual arbitration agreements, employees can work together in asserting their common legal rights by pooling their finances, making settlement demands and negotiating as a group, sharing information, and seeking safety in numbers. In addition, irrespective of individual arbitration agreements, employees can solicit other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the same legal claims, and coordinate the litigation of those claims by obtaining common representation, jointly investigating their claims, and developing common legal theories and strategies. Irrespective of individual arbitration agreements, employees can testify on behalf of one another in their arbitration proceedings, and provide affidavits in those proceedings. In short, individual arbitration agreements permit employees to do everything they can to lend one another "mutual aid and protection" in asserting their alleged legal rights against their employer.

Cf. Kenneth T. Lopatka, "A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

D.R. Horton I is therefore premised on the fundamentally false notion that "collective legal action" by employees is possible if and only if class action, collective action, and joinder procedures are available.

c. *D.R. Horton I* unreasonably concluded employees cannot waive access to class procedures.

Unions may waive Section 7 rights pursuant to collective bargaining agreements, including the right to strike and an individual employee's right to a judicial forum. ***The effect of D.R. Horton I is that a union can waive an individual's rights, but that same individual cannot do so.*** This is illogical under contract law principles and contrary to *14 Penn Plaza,* which found "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC,* 556 U.S. at 258. Whatever employees' right might be under the NLRA to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith arbitration agreement.

d. *D.R. Horton I* failed to consider the parties' substantial interests in utilizing individualized arbitration.

D.R. Horton I did not acknowledge that individualized arbitration provides benefits to both parties – the employer and the employee – by providing a relatively low-cost and quick method of adjudicating disputes. *E.g., Stolt-Nielsen,* 559 U.S. at 685 ("In bilateral arbitration,

parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). The Supreme Court has recognized that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency, confidentiality, and informality. *Concepcion*, 131 S. Ct. at 1751 ("[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

As potential defendants, employers have additional legitimate interests in agreeing to individualized arbitration. For example, the filing of a class action may impose significant costs and burdens on an employer by placing it under a duty to identify, collect, and preserve potentially relevant evidence relating to an entire putative class. Such duties frequently arise without certification ever being granted. *E.g., Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7, 2011) (employer incurred over $1.5 million to preserve putative class members' hard drives prior to any certification decision).

Additionally, the mere possibility of certification may impose such substantial defense costs and risks on a defendant that it is forced to settle irrespective of the merits of the underlying claims. Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments); *see Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009) ("When the potential liability created by a [class] lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.").

Such problems are even more acute for employers with respect to FLSA collective actions because of the very low burden imposed on plaintiffs for conditional collective action

certification. *See Williams v. Bally's La., Inc.*, 2006 WL 1235904, at *2 (E.D. La. May 5, 2006) (courts "require nothing more than substantial allegations" in support of a motion for conditional certification under the FLSA and therefore conditional certification "is typically granted"). Furthermore, an employer generally may not obtain interlocutory review of a conditional certification because it is not considered final and is not subject to Rule 23(f). *Baldridge v. SBC Commc'ns, Inc.*, 404 F.3d 930 (5th Cir. 2005). Employers thus have a legitimate interest in agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of the employee's claim on its merits while also avoiding substantial costs and risks unrelated to the strength of that claim.

e. The assertion that the *D.R. Horton I* decision would have a narrow impact was unfounded.

The Board suggested the size of a class in employment disputes would be relatively small, unlike class actions involving commercial claims. *D.R. Horton I, supra,* slip op. at 11-12 (suggesting the average employment-related class and collective actions would involve only 20 members). That is simply untrue. Class-wide employment litigation can, and often does, involve thousands of putative class and collective action members. *E.g.*, *Hawkins v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 5598365, at *3 (N.D. Ill. Nov. 16, 2011) (certifying class of more than 10,000 employees); *Rindfleisch v. Gentiva Health Servs., Inc.*, 17 Wage & Hour Cas.2d (BNA) 1081, 1084 (N.D. Ga. Apr. 13, 2011) (certifying class of up to 10,000 employees); *Stiller v. Costco*, 2010 WL 5597272, at *5 (S.D. Cal. Dec. 13, 2010) (certifying class of at least 2,000 employees); *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 300 (N.D. Ill. 2010) (certifying class of more than 10,000 employees).

Accordingly, under the applicable statutes, Supreme Court precedent, and the precedent of dozens of federal and state courts, the NLRA does not grant employees a non-waivable right

to invoke class action, collective action, or joinder procedures in pursuing an adjudication of their employment-related legal claims, contrary to the mistaken holding in *D.R. Horton I.*

6. There is no evidence the MAA interferes with any current, former, or prospective employee's ability to engage in protected, concerted activity in asserting alleged legal claims.

Absolutely ***no evidence*** exists that the MAA has ever interfered with any current, former, or prospective employee's ability to join with others to assert alleged legal claims against Hobby Lobby. As noted above, the MAA, irrespective of its providing for individual arbitration, does not prevent employees from working together in asserting their alleged legal claims and rights by:

- coordinating the pursuit of their respective claims;
- obtaining common representation;
- jointly investigating their claims;
- developing common legal theories and strategies;
- soliciting other employees to assert the same alleged legal rights;
- pooling their finances;
- making settlement demands and negotiating as a group;
- sharing information;
- acting in concert to initiate multiple individual arbitrations alleging the same legal claims;
- testifying on behalf of one another in their arbitration proceedings;
- providing other evidence for one another's arbitration proceedings; and
- otherwise "seeking safety in numbers" and joining together to attempt to increase their collective bargaining power.

In short, the MAA permits employees to do everything they can to lend one another "mutual aid and protection" in asserting their alleged legal rights and claims against Hobby Lobby.

The evidence in the record shows the MAA ***does not prevent*** employees even from filing putative class action lawsuits against Hobby Lobby. *See Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California (Joint Ex. 2Y; Joint Ex. 2 at ¶5) and *Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California (Joint Ex. 2Z; Joint Ex. 2 at ¶5). Moreover, when employees do file such class action lawsuits against Hobby Lobby in breach of the MAA, the employees have not suffered an adverse employment action. Rather, the ***evidence*** shows Hobby Lobby simply responds to such breaches of the MAA by filing a motion to compel as permitted by the FAA, 9 U.S.C. § 4. (Joint Exs. 2Y & 2Z.) Certainly, no evidence exists that Hobby Lobby has ever retaliated against an employee for filing a class action lawsuit in breach of the MAA.

* * * *

For all of the reasons set forth above, the MAA does not violate Section 8(a)(1) of the NLRA by providing that arbitration will be on an individual basis without the availability of class action, collective action, or joinder procedures.

B. The MAA cannot reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will find the rule or policy unlawful only if (1) employees would reasonably construe the language to prohibit protected Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

Here, none of these three circumstances exists. The Company did not promulgate the MAA in response to union activity. Nor has the rule been applied to restrict the exercise of Section 7 activity. Finally, no employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g.*, *Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (N.L.R.B. Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage). The MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA states:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (***including the right to file claims with federal, state or municipal government agencies***).

(Joint Ex. 2I at p. 55 (emphasis added); Joint Ex. 2J at p. 56 (emphasis added).

Thus, ***no evidence*** exists that any employee has misinterpreted the MAA as prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. Indeed, in light of the explicit statement in the MAA that it does not prohibit such complaints, any such alleged misinterpretation of the MAA would be manifestly unreasonable.

C. Hobby Lobby's enforcement of the MAA through its motions to compel arbitration does not violate Section 8(a)(1) of the Act.

The General Counsel alleges Hobby Lobby's filing lawful and successful motions to compel arbitration under the FAA in cases such as *Ortiz* and *Fardig* violates the NLRA. (Joint Ex. 2F ¶ 4(e).) The General Counsel further seeks on order that Hobby Lobby cease and desist enforcing the MAA, including, presumably, by filing additional such motions to compel in the future. (Joint Ex. 2F, pp. 3-4.) The General Counsel further seeks an order that Hobby Lobby "join in a motion to any court to vacate any order compelling individual arbitration" pursuant to the FAA. (Joint Ex. 2F, p. 4.)

The remedies sought by the General Counsel are improper and unenforceable because Hobby Lobby did not engage in any unfair labor practices. But even further, the remedies deprive Respondent of its own rights and impermissibly encroach on the authority of federal courts.

Under the circumstances presented here, the Board lacks authority to order Hobby Lobby to relinquish and not pursue its legal position in federal and state courts that the MAA is binding, valid, and enforceable. Nor can the Board preclude Respondent from seeking to enforce its mutually binding and lawful agreement with its former and current employees, including with regard to the plaintiffs in *Ortiz* and *Fardig*. Under controlling Supreme Court precedent, the Board cannot enjoin a lawsuit or deem a litigation position in court to be an unfair labor practice unless, and only unless, the litigation position is objectively baseless and motivated by an unlawful purpose. *See BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 517 (2002). As the Board has acknowledged, "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 NLRB 265, 272 (1973), enforcement denied on other grounds, *NLRB v. Visceglia*, 498 F.2d 43 (3rd Cir. 1974). A lawsuit lacks a reasonable basis "if no reasonable litigant could realistically expect success on the merits." *BE & K Const. Co.*, 351 NLRB 451 (2007).

Respondent's motions to compel arbitration are neither "objectively baseless" nor undertaken for a retaliatory purpose. Federal courts have routinely enforced arbitration agreements similar to Respondent's MAA, even though they contain class or collective action waivers. This fact compels the conclusion that Hobby Lobby's actions in enforcing the MAA could realistically be expected to produce a successful result, on the merits. Therefore, Respondent's motions to compel arbitration under the MAA are protected by the First

Amendment and cannot be enjoined or deemed an unfair labor practice under established NLRB law.

Here, the General Counsel claims Hobby Lobby engaged in an unfair labor practice by filing its motions to compel individual arbitration of plaintiffs' claims in *Ortiz* and *Fardig*. Following *Murphy Oil*, the General Counsel's proposed remedy would require Hobby Lobby to rescind or revise the MAA, and cease opposing the state law representative action in *Ortiz* and the state court class action suit in *Fardig* on the basis of the MAA. The ALJ should reject the General Counsel's claims and proposed remedies, which clearly infringe on Respondent's First Amendment right to petition the Government for redress of grievances. Indeed, scores of courts have held that motions to compel like that filed by Hobby Lobby are lawful under federal law and consistent with the purposes of the FAA. The ALJ cannot find Respondent's motion to compel individual arbitration had "an objective that [was] illegal under federal law." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983)

In *Bill Johnson's*, the Supreme Court held the Board could only issue remedies for non-NLRB litigation if that litigation was both (1) meritless and (2) retaliatory. *Bill Johnson's*, 461 U.S. at 748 ("[R]etaliatory motive and lack of reasonable basis are both essential prerequisites" to issuing a remedy regarding litigation). The Court, however, provided an exception to this rule: the NLRB may also issue remedies for litigation that is either preempted by the NLRA or "has an objective that is illegal under federal law." *Id.* at 737, n.5. There is no evidence to support a finding that the exception in *Bill Johnson's*, which allows the NLRB to impose sanctions relating to litigation with "an objective that is illegal under federal law," applies here.

The Supreme Court has held "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.*

at 743. Even if litigation activities are undertaken with the express purpose of interfering with Section 7 rights and violating Section 8(a) of the Act, the Board cannot prohibit or sanction employers for engaging in such litigation activities except as allowed by *Bill Johnson's* exception. If the phrase "objective that is illegal under federal law" is expanded to include any action that impairs rights under the NLRA, the exception will swallow the rule.

Thus, the *Bill Johnson's* exception cannot be interpreted to allow the Board to prevent an employer from pursuing a motion to compel arbitration or to allow the Board to award fees and costs for any litigation that may adversely affect Section 7 rights.

The Supreme Court has recognized an employer's motive in filing a lawsuit deemed retaliatory by the Board "may still reflect only a subjectively genuine desire to test the legality of the conduct" that is the subject of the legal action. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 533 (2002). The Court held "[i]f such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning." *Id.* at 533-534. The Court expressly declined to construe Section 8(a)(1) of the Act "so broadly" as "to reach the entire class of suits the Board has deemed retaliatory." *Id.* at 536. Hobby Lobby has the constitutionally protected right to petition a federal court for enforcement of the MAA, thereby testing the legality of the agreement's provisions. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it."). Nothing in the text of the Act supports the burden on Respondent's First Amendment rights that the General Counsel seeks to impose here.

The Supreme Court repeatedly has made clear that arbitration agreements like Respondent's MAA, even if they include class or collective action waivers, are lawful and enforceable under the FAA. *See Am. Express*, 133 S. Ct. 2304 and *Concepcion*, 131 S. Ct. 1740. Numerous courts have considered the intersection of the FAA and the NLRA as articulated in

D.R. Horton I and have nonetheless found such agreements are lawful and enforceable. By alleging Respondent's motions to compel are unlawful, the General Counsel improperly seeks to infringe on Respondent's First Amendment rights and the jurisdiction of the federal courts to decide this issue. *Bill Johnson's*, 461 U.S. at 746 (holding that the Board "must not deprive a litigant of his right to have genuine state-law questions decided by the state judiciary"); *see also BASF Wyandotte Corp.*, 278 NLRB 173, 181 (1986) (applying *Bill Johnson's* in the context of action in federal court to decide issues of federal law).

Because Hobby Lobby has a constitutional right to petition the courts, and its motions do not fall under any *Bill Johnson's* exception, the General Counsel's claims and requested remedies in this case must be rejected.

VI. CONCLUSION

For all of the foregoing reasons, the ALJ should dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I filed the foregoing **RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** via the NLRB's e-filing system, and served a true and correct copy on the following parties via electronic mail:

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This 3rd day of August, 2015.

s/Jean C. Kosela
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